

学校编码: 10384

分类号_____密级_____

学 号: 200408203

UDC_____

厦 门 大 学

硕 士 学 位 论 文

既判力理论视野中的民事再审制度改革

The Reform of Civil Retrial in Res Judicata Perspective

林 玉 奎

指导教师姓名: 齐树洁 教授

专 业 名 称: 法 律 硕 士

论文提交日期: 2007 年 3 月

论文答辩时间: 2007 年 月

学位授予日期: 2007 年 月

答辩委员会主席: _____

评 阅 人: _____

2007 年 3 月

厦门大学学位论文原创性声明

兹呈交的学位论文，是本人在导师指导下独立完成的研究成果。
本人在论文写作中参考的其他个人或集体的研究成果，均在文中以明确方式标明。本人依法享有和承担由此论文产生的权利和责任。

声明人（签名）：

年 月 日

厦门大学博硕

厦门大学学位论文著作权使用声明

本人完全了解厦门大学有关保留、使用学位论文的规定。厦门大学有权保留并向国家主管部门或其指定机构送交论文的纸质版和电子版，有权将学位论文用于非赢利目的的少量复制并允许论文进入学校图书馆被查阅，有权将学位论文的内容编入有关数据库进行检索，有权将学位论文的标题和摘要汇编出版。保密的学位论文在解密后适用本规定。

本学位论文属于

1、保密（ ），在 年解密后适用本授权书。

2、不保密（ ）

（请在以上相应括号内打“√”）

作者签名：

日期： 年 月 日

导师签名：

日期： 年 月 日

内容摘要

民事再审程序作为两审终审制的一种特殊救济程序，对确保司法公正，保障当事人的合法权益发挥了积极的作用。既判力理论是民事诉讼法学的基础理论。既判力原则要求确定的终局裁判对当事人和法院产生约束力，当事人不得就已经裁判的诉讼标的再行提起诉讼，法院也不得就既判事项作出不同的裁判。随着经济社会的发展，民事再审制度在实践中显现了诸多的弊端，尤其与民事裁判的既判力原则明显冲突，损害了司法权威，亟须重构与完善。

本文从民事裁判的既判力理论出发，分析了我国民事再审制度的弊端及其与既判力原则的冲突，结合诉讼实践的实证分析，借鉴外国的立法经验，提出在既判力理论视野中进行民事再审制度改革，实行有限再审，并对完善民事再审制度提出一些设想。全文除引言和结语外，分为四章。

第一章简要论述了既判力的概念、根据、本质、制度功能、范围等问题，形成了既判力基础理论。

第二章揭示了我国再审制度存在的诸多弊端，分析了民事再审的指导思想，启动主体的无限，再审程序启动的无时间、次数限制与既判力原则的矛盾冲突，并结合诉讼实践的实证分析，论述应在既判力视野中重构民事再审制度。

第三章简要比较研究了法国、德国、日本和美国的民事再审制度，体现出有限再审和裁判的既判力，对我国民事再审制度重构具有借鉴意义。

第四章简述了改革试点模式的探索和民事再审改革政策的演化，并对完善民事再审制度提出建议：一是重新确立民事再审制度的指导思想，构建再审之诉；二是改革启动再审程序的主体；三是从司法实践的角度，建议对再审程序的法定事由、再审管辖、审理范围、期限、次数和证据适用等进行明确规定，从而完善民事再审制度。

关键词：既判力；民事诉讼；再审制度

Abstract

Re-trial in civil procedure is a kind of special remedial procedure outside the system whereby the second instance is final and it has played a considerably active role in ensuring the judicial justice and the litigants' legal rights. The principle of Res judicata is the important fundamental theory in the civil procedure. Res judicata means the constraint of the ascertained judgment to the latter litigation. The parties can not sue the same subject matter again, and the court can not make judgment contrary to the former judgment. With the development of the society, the re-trial in civil procedure turned out many drawbacks, especially conflict with Res judicata of civil judgment, which does harm to judicial authority, waiting to be improved and perfected.

Starting from the principle of Res judicata ,it analyzes the drawbacks of re-trial system in our country and the conflicts between re-trial and Res judicata, in combination with the analyzing of judicial practice, referring to foreign legislative experiences, bringing forward the suggestion which is the reform of civil re-trial should be in Res judicata perspective, carrying out limited re-trial, and bringing forward some suggestions on perfecting Chinese re-trial system. It is divided into four chapters besides introduction and conclusion.

Chapter One is a brief introduction to the concept , the foundation , the essence, the function and the range of Res judicata, forming the principles of Res judicata.

Chapter Two explores main drawbacks of civil re-trial in our country, analyzes the conflict between the guiding ideology of civil re-trial and the principle of Res judicata, the conflict between endless civil re-trial and the principle of Res judicata, and in combination with the analyzing of judicial practice, also presents the reform of civil re-trial should be in Res judicata perspective.

Chapter Three focuses the comparison of the civil re-trial system in France, Germany, Japan and American, reveals limited re-trial and Res judicata, and offers important reference for reforming the civil re-trial system of our country.

Chapter Four discusses the exploration of new civil re-trial patterns and policies of the reform for civil re-trial, also presents some suggestions for the reform of civil re-trial: Firstly, re-specifying the guiding ideology of civil re-trial, establishing the appeal for re-trial; secondly, restricting the subject of civil re-trial; thirdly, bring

forward concrete suggestions about how to perfect the civil re-trial system of our country, including causes of re-trial, the jurisdiction over re-trial, process, expiration period, times and evidence of the civil re-trial on the basis of the judicial practice.

Key Words: Res Judicata; Civil Action; Re-trial System

厦门大学博硕

目 录	
引 言.....	1
第一章 既判力理论概论	2
第一节 既判力的涵义.....	2
第二节 既判力的根据.....	3
一、制度效力说.....	3
二、程序保障下的自我归责说.....	4
三、双重根据说.....	4
四、国家审判权说.....	4
第三节 既判力的本质.....	5
一、实体法说.....	5
二、诉讼法说.....	6
三、权利实在说.....	6
四、新诉讼法说.....	6
五、折衷说.....	7
第四节 既判力的制度功能.....	8
一、既判力的消极作用.....	8
二、既判力的积极作用.....	9
第五节 既判力的范围.....	9
一、既判力的客观范围.....	9
二、既判力的主观范围.....	10
三、既判力的时间范围.....	11
第二章 民事再审制度与既判力理论的冲突	12
第一节 我国现行民事再审制度的弊端.....	12
一、法院可以依职权主动启动民事再审程序.....	12
二、检察机关拥有不受限制的再审抗诉权.....	13
三、再审事由过于抽象.....	13

四、再审不受发起时间和次数的限制.....	14
第二节 民事再审制度与既判力原则的矛盾.....	15
一、再审立法指导思想与既判力理论的冲突.....	15
二、再审启动主体与既判力主观范围的冲突.....	16
三、无限再审和既判力本质的冲突.....	18
第三节 实证分析.....	20
第三章 外国民事再审制度比较研究.....	22
第一节 法国的民事再审程序.....	22
第二节 德国的民事再审程序.....	23
第三节 日本的民事再审程序.....	24
第四节 美国的民事再审程序.....	25
第五节 比较与评析.....	26
第四章 我国民事再审制度之重构.....	27
第一节 民事再审制度的改革探索.....	27
一、改革试点模式的探索.....	28
二、民事再审制度改革政策的演化.....	29
三、民事再审制度的改革建言.....	30
第二节 确立指导思想与架构再审之诉.....	31
第三节 改革再审程序的启动方式.....	32
一、取消法院启动再审程序的主体资格.....	32
二、限制人民检察院的民事再审抗诉权.....	33
第四节 重新规定再审事由.....	35
一、程序方面的再审事由.....	35
二、实体方面的再审事由.....	36
第五节 再审程序的其他具体制度改革.....	36
一、申请再审诉状要求.....	36
二、明确再审程序的审理范围.....	37
三、明确再审时效.....	37
四、限定再审次数.....	37

五、明确再审管辖与再审受理.....	37
六、再审执行问题.....	38
七、再审证据适用.....	38
结 语.....	39
参考文献.....	40

厦门大学博硕

CONTENTS

Introduction.....	1
Chapter 1 Outline of Res Judicata	2
Subchapter 1 The Concept of Res Judicata.....	2
Subchapter 2 The Foundation of Res Judicata	3
Section 1 Doctrine of institutional effect	3
Section 2 Doctrine of safeguard of right.....	4
Section 3 Doctrine of dual sources	4
Section 4 Doctrine of national judicial authority	4
Subchapter 3 The Essence of Res Judicata.....	5
Section 1 Substantive law point.....	5
Section 2 Procedural law theory	6
Section 3 Substantive right theory	6
Section 4 New procedural law theory	6
Section 5 Double-character theory.....	7
Subchapter 4 The Function of Res Judicata.....	8
Section 1 The negative aspects of Res judicata	8
Section 2 The positive aspects of Res judicata	9
Subchapter 5 The Scope of Res Judicata	9
Section 1 The objective scope of Res judicata.....	9
Section 2 The subjective scope of Res judicata	10
Section 3 The time scope of Res judicata	11
Chapter2 The Conflicts between Re-trial in Civil Procedure and Res Judicata	12
Subchapter1 The Main Drawbacks of the Current Re-trial in Civil Procedure of Our Country	12
Section 1 Courts can launch the re-trial by authority	12
Section 2 Procurator can launch the re-trial without any restrictions	13
Section 3 The causes of re-trial are too abstract	13
Section 4 No limits of expiration and times for re-trial	14

Subchapter2	The Conflicts between Re-trial in Civil Procedure and Res	
	Judicata	15
Section1	The conflict between the guiding ideology of civil re-trial and the principle of Res judicata	15
Section 2	The conflict between the start main body of the re-trial and the subjective scope of Res judicata	16
Section3	The conflict between unlimited re-trial and the essence of Res judicata.....	18
Subchapter3	The Analyzing of Judicial Practice	20
Chapter3	The Comparison of Foreign Re-trial in Civil Procedure.	22
Subchapter1	The Re-trial in Civil Procedure of France	22
Subchapter2	The Re-trial in Civil Procedure of Germany	23
Subchapter3	The Re-trial in Civil Procedure of Japan.....	24
Subchapter4	The Re-trial in Civil Procedure of American.....	25
Subchapter5	Comparison and Evaluation.....	26
Chapter4	The Re-construction of Re-trial in Civil Procedure in Our Country.....	27
Subchapter1	The Reform Outlet of Re-trial in Civil Procedure	27
Section1	Probing new patterns of civil re-trial	28
Section2	The evolution of civil re-trial policies	29
Section3	Proposing re-constructive suggestions of civil re-trial	30
Subchapter2	Re-specifying the Guiding Ideology of Civil Re-trial and Establishing the Appeal for Re-trial	31
Subchapter3	Reform Re-trial Procedure Start Way	32
Section 1	Cancel the main body qualification of the court to launch the re-trial	33
Section 2	Limit the public Prosecutor' power to launch the re-trial	35
Subchapter4	Re-defining Causes of Re-trial	35
Section 1	Procedural cause of action	36
Section 2	Substantive cause of action	36
Subchapter5	The Other Concrete Suggestions of Re-construction of Re-trial	36

Section 1	Application of appeal for civil re-trial	37
Section 2	Specifying scope of the civil re-trial	37
Section 3	Specifying the expiration period to launch the re-trial	37
Section 4	Specifying the times to launch the re-trial	37
Section 5	Specifying the court for the jurisdiction over retrial and the re-trial accepts	37
Section 6	The execution of the previous judgment for the re-trial	38
Section 7	The evidence of civil re-trial	38
Conclusion	39
Bibliography	40

引 言

近年来，随着改革开放不断深入，经济社会的快速发展，现行民事再审制度日渐暴露出其理论性和制度性的缺陷。在诉讼实践中，无限申诉、无限再审、缠讼不止、终审不终等情况大量出现。这种状况不仅加重了当事人的诉讼成本，也无端消耗了非常稀缺的司法资源，更严重削弱了人民法院民事裁判的既判力，引发了一系列社会矛盾。现行民事再审制度的改革势在必行，这已成为理论界和实务界的共识。

任何纠纷的存在，不仅表明纠纷当事人之间的冲突，亦表明某一具体社会关系处于极不稳定的状态。司法作为解决社会纠纷的最后一道防线，应当满足诉讼定纷止争的这一自然法则，所谓“迟来的正义非正义”，“诉讼过分迟延等同于拒绝裁判”的古老理念，便是最好的印证。既判力原则要求确定的终局裁判对当事人和法院产生约束力，当事人不得就已经裁判的诉讼标的再行提起诉讼，法院也不得就既判事项作出不同的裁判。而民事再审程序是指对已经发生法律效力裁判，发现确有错误，依法对案件进行再次审理的程序。再审程序作为对生效判决的一种特殊救济程序，对民事终局裁判既判力产生了不利的影响。既判力理论侧重法的安定与效率价值，它的作用是通过维护裁判的稳定来赢得人们对法的崇尚；再审程序偏重正义价值，它的最终目的是为了赢得人们对司法神圣与公正的敬仰。尽管既判力理论与再审制度在形式上存在着冲突，但是在维护司法的权威性上，“再审程序和既判力理论的最终目的应当是一致的”^①。两者实质上是可以在民事诉讼中寻得平衡点，也存在制度设计上的价值选择与整合，能够实现两者协调统一。大陆法系诉讼法就既承认了既判力理论，又设置了再审制度，通过严格限制启动再审的条件来实现对立中的统一。

任何诉讼程序都是消耗社会财富的，再审程序也不应该无限空泛地适用。因此，民事再审制度的设计必须注重既判力理论，不可能对一切司法瑕疵进行救济，应当在保障当事人诉权的前提下，依法在有限范围内进行。

本文以既判力理论为基点，重新审视与架构我国的民事再审制度。

^①杨荣馨.民事诉讼原理[M].北京：法律出版社，2003.478.

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕